

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVE McCORMICK FOR U.S. SENATE and
DAVID H. McCORMICK,

Petitioners,

v.

Case No. 286MD2022

LEIGH M. CHAPMAN, in her official
capacity as Secretary of State for the Commonwealth,
ADAMS COUNTY BOARD OF ELECTIONS,
ALLEGHENY COUNTY BOARD OF ELECTIONS,
BEAVER COUNTY BOARD OF ELECTIONS,
BEDFORD COUNTY BOARD OF ELECTIONS,
BERKS COUNTY BOARD OF ELECTIONS,
BLAIR COUNTY BOARD OF ELECTIONS,
BRADFORD COUNTY BOARD OF ELECTIONS,
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BUTLER COUNTY BOARD OF ELECTIONS,
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UNION COUNTY BOARD OF ELECTIONS,
VENANGO COUNTY BOARD OF ELECTIONS,
WARREN COUNTY BOARD OF ELECTIONS,
WASHINGTON COUNTY BOARD OF ELECTIONS,
WAYNE COUNTY BOARD OF ELECTIONS,
WESTMORELAND COUNTY BOARD OF ELECTIONS,
and WYOMING COUNTY BOARD OF ELECTIONS,

Respondents.

MOTION FOR IMMEDIATE SPECIAL INJUNCTION AND
SUPPORTING MEMORANDUM OF LAW

The above-listed County Boards of Elections (“Boards”), on information and belief, refuse to count (or to commit to counting) absentee and mail-in ballots simply because the voters failed to handwrite a date on the exterior mailing envelope, which is separated by yet another envelope from the ballot itself. These are valid ballots: they were indisputably received on time, having been date-stamped upon receipt, and the absence of a handwritten date on the exterior envelope is immaterial under both state and federal law. Yet as things stand, the ballots will not be included in the tally when the Boards report the unofficial returns of the canvass to the Department of State on Tuesday, May 24, 2022. *See* 25 P.S. § 3154(f). Without immediate relief from this Court, these qualified voters will be disenfranchised today.

Pursuant to Pennsylvania Rule of Civil Procedure 1531(a), Petitioners therefore seek an immediate special injunction, and request that the Court issue the injunction before holding a hearing either in-person or by video conference on this motion. In support, Petitioners state as follows.

1. Rule 1531(a) allows the Court to issue an injunction without notice or a hearing if it appears “that immediate and irreparable injury will be sustained before notice can be given or a hearing held.” PA. R. CIV. P. 1531(a). In determining whether to issue an injunction and whether to do so before a hearing, “the court may act on the basis of,” among other things, “the averments of the pleadings or petition.” *Id.*

2. A special injunction is warranted where (1) it is necessary to prevent immediate and irreparable harm, (2) greater injury would result from refusing than from granting the injunction, (3) the injunction would restore the status quo ante, (4) the movant is likely to succeed on the merits, (5) the requested injunction is appropriately tailored to the harm, and (6) the injunction is not adverse to the public interest. *See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). All factors are satisfied here.

3. Starting with the merits (factor 4), Petitioners are overwhelmingly likely to prevail in this action. Pennsylvania law states that “the elector” must place his “absentee ballot” in an exterior mailing envelope that he must “fill out, date and sign.” 25 P.S. §§ 3146.6(a), 3150.16(a). Relying on these provisions, the Boards are currently refusing to count (or to commit to counting) ballots where the voter failed to handwrite a date on the envelope but otherwise complied with all applicable requirements, and where the Boards stamped the envelope with the date the Boards received the ballot. *See* Pet. for Decl. & Inj. Relief (May 23, 2022), Exhibit 2 (correspondence with counsel for Blair County Board of Elections).

4. Pennsylvania’s dating requirement, however, is unenforceable under both state and federal law. A plurality of the Pennsylvania Supreme Court has already held that the Commonwealth’s Election Code—which “must be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their

choice”—“*does not require* boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot’s outer envelope but did not handwrite . . . [the] date, where no fraud or irregularity has been alleged.” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062, 1071 (Pa. 2020) (plurality op.) (“*In re 2020 Canvass*”). And the U.S. Court of Appeals for the Third Circuit has held that federal law—specifically a provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B)—*prohibits* county boards of elections from rejecting absentee or mail-in ballots on that basis. *See* Initial and Amended Judgment, *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 22-1499, Doc. 80 (3d Cir. May 20, 2022) (“*Migliori Judgment*”) (Exhibit 1 to Pet. for Decl. & Inj. Relief). Federal law overrides any contradictory state requirements, *see* U.S. CONST. art. VI, cl. 2, and Pennsylvania courts presumptively defer to the Third Circuit’s construction of federal law, *see, e.g., W. Chester Area Sch. Dist. v. A.M.*, 164 A.3d 620, 630 (Pa. Commw. Ct. 2017).

5. Section 10101(a)(2)(B) provides:

[n]o person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is *not material in determining whether such individual is qualified under State law to vote* in such election.

52 U.S.C. § 10101(a)(2)(B) (emphasis added). On May 20, 2022, a panel of the Third Circuit ruled, unanimously, that this provision prohibited the Lehigh County

Board of Elections from rejecting timely received absentee and mail-in ballots cast in a November 2021 municipal election solely because the ballots' exterior mailing envelopes lacked handwritten dates. See *Migliori* Judgment at 2.¹ Although the court has issued only a judgment, with an opinion to follow, its reasoning is clear from the judgment: these dates “are immaterial under § 10101(a)(2)(B),” *id.*, meaning that they are immaterial to determining whether the voter is qualified to vote.

6. That reading is correct. The mailing envelope of an absentee or mail-in ballot is a “record or paper relating to” an “act requisite to voting,” but an error on that “record or paper” is “not material in determining whether [an] individual is qualified under State law to vote in [an] election.” 52 U.S.C. § 10101(a)(2)(B). The statute defines “vote” to include “all action necessary to make a vote effective,” including “casting a ballot.” *Id.* § 10101(e). And it defines “qualified under State law” to mean, as pertinent, “qualified according to the laws, customs, or usages of the State.” *Id.* Putting these together, a state may reject a ballot on account of an “error or omission” that a voter commits on a “record or paper” in the act of “casting a ballot” only if the error or omission is relevant under the state’s “laws, customs, or usages” to the voter’s qualification to vote.

¹ The Third Circuit issued an amended judgment on May 23, 2022, apparently to clarify that only timely received ballots are covered by its order to count ballots that are missing a handwritten date.

7. As the Pennsylvania Attorney General told the Third Circuit in *Migliori*, the Commonwealth imposes four qualifications on the right to vote: as of election day, the voter must be 18 years old, a United States citizen for at least one month, a resident of the Commonwealth and of his election district for at least thirty days, and not an incarcerated felon. *See* Br. of the Commw. of Pa. as *Amicus Curiae* at 2, *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 22-1499, Doc. 42 (3d Cir. Apr. 1, 2022) (“Commw. *Amicus* Br.”). The date when the voter filled out and signed the exterior envelope of his absentee or mail-in ballot has nothing to do with any of these voter qualifications, nor with whether the voter’s absentee or mail-in ballot was timely received by the county board of elections. The presence of a handwritten date on that envelope is therefore “not material” under Section 10101(a)(2)(B).

8. Other courts read Section 10101(a)(2)(B) similarly. The U.S. Court of Appeals for the Eleventh Circuit, for example, has interpreted the provision to “ask[] whether, accepting the error *as true and correct*, the information contained in the error is material to determining the eligibility of the applicant.” *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1175 (11th Cir. 2008) (emphasis in original); *see* Commw. *Amicus* Br. at 15 (collecting further cases). That cannot be the case where, as here, Commonwealth law—as interpreted by the Department of State—does not even require a voter to write the *correct* date on the exterior mailing envelope. *See* Email from Jonathan Marks, Deputy Sec’y for Elections & Comm’ns

(June 3, 2021, 9:21 a.m. EDT), Ex. A. If a voter could date his ballot May 32, or 300 B.C.E., and if that error, taken as true and correct, does not impede elections officials from determining his qualification to vote, then the absence of a handwritten date cannot be material under Section 10101(a)(2)(B), either. Under the “laws, customs, [and] usages of the State,” the date on the exterior envelope of an absentee or mail-in ballot is simply irrelevant to that question. 52 U.S.C. § 10101(e).

9. Nothing would be gained by reading the statute any differently. The date on the exterior envelope does not help determine whether the voter in fact is qualified to vote under Commonwealth law, *e.g.*, is 18 years old, has been a citizen for a month, and has lived in his election district for 30 days. All those qualifications are determined by the date *of the election*. The handwritten signing date does not help separate timely received ballots from tardy ballots. A ballot is timely if returned by 8 p.m. on election day, and Boards will know that a ballot is timely because they date-time stamp ballots upon receipt. The handwritten date does not help prevent any hypothetical fraud that might be accomplished by backdating the envelope. If the ballot is received by the deadline (and has no other material deficiencies), it will count; if not, then it will not count. And again, the Commonwealth does not even require that any handwritten date the voter might place on the exterior envelope be the date he actually executed the ballot.

10. In short, Pennsylvania’s date requirement for absentee and mail-in ballots serves no logistical, confidentiality, or anti-fraud purpose. All these purposes are already served by other Commonwealth election practices and laws. The ballot-return deadline and ballot-stamping process ensure that ballots will be counted only if received on time. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). The sealed inner-secrecy envelope, in which the ballot must be placed before being placed in the exterior mailing envelope, protects voter confidentiality. *See id.* §§ 3146.6(a), 3150.16(a). Voters cannot use absentee or mail-in ballots to vote twice, because they must surrender their blank absentee or mail-in ballots in order to vote in-person. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3). And if an absentee or mail-in voter’s ballot is timely received after the voter has moved out of state, renounced his citizenship, or entered prison for a felony, Commonwealth law requires that his vote be invalidated regardless of whatever date he might write on the mailing envelope, which would not help elections officers determine any of those facts. *See* PA. CONST. art. VII, § 1; 25 P.S. § 2811; 25 Pa. C.S. § 1301(a). In short, enforcing the dating requirement serves only one purpose—to gratuitously disenfranchise qualified Pennsylvania voters who have cast otherwise valid ballots on a timely basis.

11. In this case, Section 10101(a)(2)(B) prohibits the Boards from rejecting absentee and mail-in ballots cast in the May 17, 2022 Primary solely because they lack the handwritten date required by 25 P.S. §§ 3146.6(a) and 3150.16(a). Whether

or not a voter neglected to write a date on the mailing envelope is entirely immaterial to whether that voter “is qualified under State law to vote” under Section 10101(a)(2)(B). Indeed, guidance from the Pennsylvania Department of State instructs that “there is no basis to reject a ballot for putting the ‘wrong’ date on the envelope.” Ex. A (Email from Jonathan Marks, Deputy Sec’y for Elections & Comm’ns). If a ballot cannot be rejected because the voter affirmatively wrote the *wrong* date on the exterior envelope, there can be no valid basis to reject a ballot simply because a voter neglected to write a date in that spot. Just as in *Migliori*, and even more so in light of the *Migliori* judgment, “there is no basis on this record [for the Boards] to refuse to count undated ballots.” *Migliori* Judgment at 2.

12. Separately, the Commonwealth’s Constitution affords similar protections to voters whose ballot remains hostage to an immaterial requirement. It declares that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5. The Pennsylvania Supreme Court has long held that elections are “free and equal” only when “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). And the Court has explained that efforts must be made to “equalize the power of voters” and to avoid disenfranchisement even when it happens “by inadvertence.” *League of Women Voters v. Commonwealth*, 178

A.3d 737, 810, 812 (Pa. 2018) (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (Pa. 1929)).

13. That is precisely why a plurality of the Pennsylvania Supreme Court held that ballots should count regardless of whether they include a handwritten date. See *In re 2020 Canvass*, 241 A.3d at 1061–62 (plurality op.). The plurality reiterated the “well-settled principle of Pennsylvania election law that every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Id.* at 1071 (cleaned up). Viewed through that lens, the plurality “conclude[d] that dating the declaration is a directory, rather than a mandatory, instruction.” *Id.* at 1076. “[W]hile both mandatory and directory provisions of the Legislature are meant to be followed,” the plurality explained, “the difference between a mandatory and directory provision is the consequence for non-compliance: a failure to strictly adhere to the requirements of a directory statute will *not nullify* the validity of the action involved.” *Id.* at 1078–79 (emphasis added; internal quotation marks omitted). To qualify as mandatory, a statutory requirement must advance a “weighty interest.” *Id.* at 1073. And “while constituting [a] technical violation[] of the Election Code,” *id.* at 1079, a failure to handwrite a date on the ballot’s outer envelope does not “implicate . . . ‘weighty interests’ in the election process, like ballot confidentiality or fraud prevention,” *id.* at 1076 (citation omitted). It is instead a “minor irregularit[y],” which does “not warrant the wholesale disenfranchisement

of,” in that case, “thousands of Pennsylvania voters,” and likely thousands of voters here. *Id.* at 1079.

14. The imperative to count votes now is starker still. In 2020, the dissenting and concurring opinions in *In re 2020 Canvass* diverged from the plurality on the handwritten-date issue because they saw the requirement as providing a fixed point in time when the voter filled out the ballot. *See id.* at 1079 (Wecht, J., concurring in part and dissenting in part), 1090 (Dougherty, J., concurring in part and dissenting in part). If that date fell *after* the deadline to return a ballot, *i.e.*, at 8 p.m. on election day, then the ballot was late and could not be canvassed. Or if that date fell *after* the deadline for the voter to register to vote, then the voter was ineligible to cast a ballot in the election that followed.

15. But the reasons that the dissenting and concurring justices found compelling collapse under the weight of current facts: county boards of elections now uniformly date-stamp absentee and mail-in ballots upon receipt; Petitioners are aware of no county board that failed to do so in this Primary. The date stamp provides “a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfl[u]ous.” *Id.* at 1077 (plurality op.). Moreover, the Commonwealth has said that “there is no basis to reject a ballot for putting the ‘wrong’ date on the envelope,” and “the date written” on the envelope is not “used to determine the eligibility of the voter.” Ex. A (Email from Jonathan Marks, Deputy

Sec’y for Elections & Comm’ns). In other words, the date serves no purpose. It is only a “regulation of the right to exercise the franchise” that now threatens to “deny the franchise itself” to thousands of qualified Pennsylvania voters. *Winston*, 91 A. at 523. Under the circumstances, the Commonwealth’s Constitution requires that the Boards canvass ballots where the only omission is a handwritten date on an outer envelope, the only material effect of which is to prevent a valid vote from being counted by virtue of 25 P.S. §§ 3146.6(a) and 3150.16(a). Otherwise, voters of both political parties will be disenfranchised by mere “inadvertence,” in violation of the Commonwealth Constitution. *League of Women Voters*, 178 A.3d at 810.

16. The above provisions and precedents demand that the Boards count absentee and mail-in ballots that lack a handwritten date on the exterior mailing envelope but no other deficiencies. A ruling to this effect will return the Boards and voters to the conditions that prevailed under *In re 2020 Canvass*, and that the Third Circuit has reinstated for an intervening municipal election in *Migliori*, and would be tailored to redress the harm that the Boards would otherwise cause this defined class of voters (factors 3 and 5).

17. As for the equities (factors 1, 2, and 6), the Boards must complete their canvass of the recent primary election and report the unofficial returns to the Department of State by today. If this Court does not act before then, likely thousands of voters will be unlawfully disenfranchised on account of an immaterial technical

error. There is no more fundamental right in our democracy than the right to choose one's representatives. *See, e.g., Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”). And there is no more irreparable injury than being denied that right.

18. Voters in the Boards' counties will be denied that right in a matter of hours. Counting their votes will cause no harm to the Board and could cause no harm to the public interest, which is best served when valid votes of all qualified voters are counted. Relief thus need not—and, under the circumstances, cannot—wait for a hearing.

WHEREFORE, Petitioners ask that this Court issue a special injunction without a hearing, which Rule 1531(d) allows to be held “within five days after the granting of the injunction or within such other time as the parties may agree or as the court upon cause shown shall direct.” PA. R. CIV. P. 1531(d).

Dated: May 24, 2022

Respectfully Submitted,

/s/ Ronald L. Hicks, Jr.

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WESTMORELAND COUNTY BOARD OF ELECTIONS,
and WYOMING COUNTY BOARD OF ELECTIONS,

Respondents.

/

[PROPOSED] ORDER

And now, to wit, this _____ day of May, 2022, upon consideration of Petitioners' Motion for Immediate Special Injunction, and finding that good cause exists for the same, it is hereby ORDERED that the Respondent County Boards of Elections shall count all timely received absentee and mail-in ballots that lack a voter-provided date on the exterior envelope as part of their unofficial and/or official results for the May 17, 2022, Primary.

By the Court

_____ J.

EXHIBIT A

From: Marks, Jonathan <jmarks@pa.gov>
Sent: Tuesday, June 1, 2021 9:21 AM
To: Marks, Jonathan <jmarks@pa.gov>
Subject: DOS Email: Reminder Regarding Requirement to Sign AND Date Declaration Envelopes

County of Lehigh Warning: This is an external email. Please exercise caution.

Good morning everyone.

Since the Municipal Primary on May 18, the department has seen several news articles suggesting that some counties are continuing to accept and count ballots that do not contain both a signature and a date on the voter's declaration.

As you know, the department updated the content and the instructions on the declaration envelope to ensure that voters know they must **sign and date** the envelope for their ballot to be counted. Furthermore, our updated guidance is consistent with the Supreme Court's ruling last September in *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, wherein the Court held that in future elections a voter's declaration envelope must be both signed and dated for the ballot to count. Though we share your desire to prevent the disenfranchisement of any voter, particularly when it occurs because of a voter's inadvertent error, we must strongly urge all counties to abide by the Court's interpretation of this statutory requirement.

We also believe that it is prudent to again remind you of our previous clarification of 10/25/2020. As noted in that communication, there is no basis to reject a ballot for putting the "wrong" date on the envelope, nor is the date written used to determine the eligibility of the voter. You should process these ballots normally.

If you have any questions about the guidance posted on the department's website, please contact us and please consult with your solicitor.

Thank you for everything that you do.

Kind Regards,

Jonathan M. Marks

Deputy Secretary for Elections & Commissions

PA Department of State

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